STATE OF MICHIGAN

COURT OF APPEALS

POLICE OFFICERS ASSOCIATION OF MICHIGAN and DUANE HAGGERTY, Plaintiffs-Appellees,	UNPUBLISHED April 18, 2006
v	No. 266097 Sanilac Circuit Court
COUNTY OF SANILAC and VIRGIL STRICKLER, Defendants-Appellants.	LC No. 04-030037-CL

Before: Murphy, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order confirming and enforcing a labor arbitration award and granting plaintiffs' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts and Proceedings

According to the factual findings made by the arbitrator, plaintiff Duane Haggerty was initially employed by defendant Sanilac County[1] as a full-time police officer in 1958. He left and returned to employment with Sanilac County several times, and was working full-time when, on April 23, 1977, he injured his back in a work-related accident. He returned to work as a jail coordinator, but again injured his back. Haggerty last worked as an active employee on March 24, 1979, and has received worker's compensation benefits since March 1979.

Haggerty has not received income or W-2 forms from defendants since 1979, and has not received the apparently standard clothing allowance, holiday pay, Christmas bonus, or longevity pay since March 1979. He was not paid his pension contributions or his accrued vacation time, and was never given an official notice of termination of employment. Haggerty was never asked to return his uniforms or his firearm. Defendants continued to pay Haggerty's health insurance

[1] Defendant Virgil Strickler is the Sanilac County Sheriff.

premiums, including premiums for his wife, through March 13, 2003. Haggerty received new Blue Cross/Blue Shield cards when they were issued to other employees.

Haggerty received notice in March 2003 that defendants would no longer pay for his health insurance premiums. He subsequently contacted plaintiff Police Officer's Association of Michigan (POAM)[2] which filed a grievance on his behalf on March 20, 2003, asserting that he had been wrongfully denied health insurance coverage. Defendants denied the grievance on the ground that Haggerty was not an employee for whom a grievance could be filed. Defendants also argued that Haggerty was not entitled to contractual health insurance coverage. The grievance was not resolved, and proceeded to arbitration pursuant to Article X of the department's 2000-2002 contract.

Throughout the relevant time frame, defendants' employees have engaged in collective bargaining. The arbitrator specifically reviewed provisions in the 1979-1980 and 2000-2002 agreements. The essential question put before the arbitrator was whether Haggerty was an employee or whether his employment had been terminated after he became disabled.

The arbitrator examined the contract language offered by the parties as well as other language of Articles XII, XXXIII, X, XIV, and XXII in both agreements and concluded that the Haggerty was, and still is, an employee under the language of the agreements. He found that while the contract language concerning employment status ambiguous and conflicting, it was undisputed that, under certain contract provisions, an individual would still be considered an employee even though the individual may not have been actively working, such as an employee on vacation, under an approved extended leave of absence, or under other circumstances. In contrast, the arbitrator found that the provision granting health insurance benefits to disabled employees was clear and unequivocal and that it "clearly anticipates that a person will be an 'employee' while on a work-related disability." The arbitrator questioned whether this clear language "gave way" to the cited language above in Article XIV.

The arbitrator found convincing the fact that defendants had treated Haggerty as an employee for the last 23 years. He disagreed with defendants' contention that Haggerty had "fallen through the cracks" for such a lengthy period. He was convinced that "the Employer was well aware of what was transpiring" and that it was "regularly and routinely made aware that the grievant was listed as a recipient of medical coverage." The arbitrator also seemed to rely on the fact that Haggerty had never received a notice of termination, or a pension or vacation time pay off, in reaching this decision.

The arbitrator found that defendants violated the contract by terminating Haggerty's medical coverage, and ordered the coverage reinstated. He also ordered that Haggerty was to be reimbursed for any out-of-pocket expenditures necessitated by the termination of his medical coverage.

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[2] POAM is the bargaining representative for the union employees in the Sheriff's Department bargaining unit.

Defendants reinstated Haggerty's medical coverage, but refused to reimburse him for approximately $11,000 in out-of-pocket expenses. Plaintiffs filed suit to enforce the award; defendants filed a countercomplaint to vacate the award. The parties moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court found that the arbitrator did not exceed his authority when he interpreted the contract language to find that Haggerty was an employee and was entitled to health care benefits. The trial court denied defendants' motion to vacate the award and granted plaintiffs' motion to enforce the award.

II. Analysis

A trial court's decision to enforce, vacate, or modify an arbitration award is reviewed de novo. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). Our review of this issue, like that of the trial court, is limited. A court may not review an arbitrator's factual findings or decision on the merits; a court may only decide whether the award draws its essence from the contract. *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150; 393 NW2d 811 (1986); *Police Officers Ass'n of Michigan v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002). If an arbitrator did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the arbitration agreement, judicial review effectively ceases. *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 118; 607 NW2d 742 (1999). The arbitrator's authority to resolve a dispute concerning the interpretation of a collective bargaining agreement is derived exclusively from the contractual agreement of the parties. *Gibraltar School Dist v Gibraltar MESPA-Transportation*, 443 Mich 326, 341; 505 NW2d 214 (1993).

Whenever an arbitrator acts beyond the material terms of the contract from which he primarily draws his authority, a reviewing court may find that the arbitrator has exceeded his power. We will not engage in underlying contract interpretation, which is a question only for the arbitrator, especially when it involves the application of questions of fact. *Service Employees Int'l Union, Local 466M v City of Saginaw*, 263 Mich App 656, 660; 689 NW2d 521 (2004); *Brucker v McKinlay Transport, Inc*, 454 Mich 8, 15, 17-18; 557 NW2d 536 (1997); *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). "The fact that an arbitrator's interpretation of a contract is wrong is irrelevant." *Michigan State Employees Ass'n v Dep't of Mental Health*, 178 Mich App 581, 583-584; 444 NW2d 207 (1989), quoting *Ferndale Ed Ass'n v Ferndale School Dist No 1*, 67 Mich App 637, 642-643; 242 NW2d 478 (1976). A reviewing court must be careful to avoid reviewing the merits of the underlying claim. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). Absent express language to the contrary in the agreement, an arbitration award will be presumed to be within the scope of the arbitrator's authority. *Id*.

The arbitrator's authority in the instant case was set forth in Article X, § 10.5 of the 2000-2001 agreement, which provides in relevant part:

> 10.5: The arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement or any supplementary agreement nor to rule on any matter except while this Agreement is in full force and effect between the parties. (The arbitrator shall have no power to establish wage scales or rates on new or changed jobs,) or to change any rate unless it is provided for in this Agreement.

Defendants argue that the arbitrator exceeded his authority when he "modified" the contract by finding that Haggerty was an employee entitled to benefits, and maintain that, under the language of the agreement, Haggarty's status as an employee ended shortly after his last workday. We disagree.

The arbitrator's award clearly drew its essence from the agreement because it dealt with defendants' claim that Haggerty was not an employee and therefore not entitled to continued health benefits. In adjudicating plaintiffs' grievance, the arbitrator did not inject any new terms into the agreement, or unduly "modify" it in violation of Article X, § 10.5. Instead, the arbitrator interpreted and applied the contract terms and determined whether Haggerty met the contract definition of employee and whether he was entitled to continued benefits under the language of the agreement. The arbitrator's ability to determine whether Haggerty fit within the definition of employee was drawn from the essence of the agreement and did not involve an interpretation of provisions withheld from the arbitrator's jurisdiction. Defendants essentially argue that the arbitrator exceeded his power because Haggerty was not an employee. However, in order to claim that the arbitrator exceeded his authority, defendants would require this Court to interpret the contract to determine Haggerty's employment status, and then find that the arbitrator's interpretation was incorrect. This is not the proper scope of our review. *Gordon Sel-Way*, *supra* at 497.

We further disagree with defendants' arguments that the arbitrator exceeded his authority because his analysis ignored the plain language of the agreement. We find the language in *Pennsylvania Power Co v Local Union No 272 of the IBEW*, 276 F3d 174 (CA 3, 2001), persuasive on this point. Citing *United Paperworkers Int'l Union v Misco, Inc*, 484 US 29, 38; 108 S Ct 364; 98 L Ed 2d 286 (1987), the *Pennsylvania* Court noted that an arbitration award may be vacated where there is a manifest disregard of the agreement "totally unsupported by principles of contract construction and the law of the shop." *Pennsylvania Power Co*, *supra* at 178-179.

Here, the arbitrator's decision was not "totally unsupported by principles of contract construction." Instead, as the arbitrator noted, both interpretations advanced by plaintiffs and defendants were plausible based on the confusing language of the provisions at issue and the actions of defendants toward Haggerty. None of the contract provisions directly defined the term "employee." Although Haggerty's employment could be deemed to have terminated under the provisions cited by defendants, the arbitrator noted that other contract provisions allowed for an indefinite extension of an approved leave of absence. Whether the trial court or we would deem one interpretation more favorable is irrelevant. *Michigan State Employees Ass'n*, *supra* at 584.

Moreover, we disagree with defendants' assertion that the arbitrator clearly exceeded his authority when he looked toward the parties' past practices to determine that defendants had treated Haggerty as an employee despite the fact he was not actively working due to his disability. An arbitrator may use past practices of parties to a collective bargaining agreement to interpret ambiguous language or even to show that clear language was modified by mutual agreement as demonstrated by inference from the circumstances. *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 328; 550 NW2d 228 (1996). Furthermore, in the face of ambiguity or silence in the contract, only a "tacit agreement that the practice would continue" is needed. *Amalgamated Transit Union, Local 1564, AFL-CIO v*

Southeastern Michigan Transportation Authority, 437 Mich 441, 454-455; 473 NW2d 249 (1991). Given the lack of clear guidance in the contract language, the arbitrator properly reviewed how defendants actually treated Haggerty for 23 years in deciding whether the parties had historically interpreted the agreement to include Haggerty as an employee.[3]

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Christopher M. Murray

[3] We again note that whether we would have ruled differently than the arbitrator, and whether the arbitrator's contract interpretation was "wrong," are not relevant criteria to our appellate review. *Michigan State Employees Ass'n, supra.*